No. 22190

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
a corporation,

Appellant,

v.

ROCKWOOD WATER DISTRICT, a municipal
corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the Final Judgment of the United States
District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

KING, MILLER, ANDERSON, NASH & YERKE
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STATEMENT OF JURISDICTION

This action was filed on March 14, 1966, in the rcuit Court of the State of Oregon for the County of ltnomah (R[1] 1, 5-7).

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he record on appeal is referred to herein as "R."

March 31, 1966, appellant filed its petition for removal (R. 1-71), bond on removal (R. 72-74) and notice of filing petition and bond for removal (R. 75-76) in the United States District Court for the District of Oregon.

The jurisdiction of the District Court was properly invoked and the action was properly removed under the provisions of 28 USCA, Section 1441, as the District Court had original jurisdiction of the action under 28 USCA, Section 1332. This jurisdiction obtained because the parties are citizens of different states and the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs (R. 2).

The action was tried before The Honorable Robert C. Belloni, sitting without a jury, on April 27 and 28, 1967 (R. 92-93). June 21, 1967, the court entered its opinion (R. 199-205) for appellee. Final judgment was entered for appellee on July 7, 1967 (R. 206-207).

Appellant filed its notice of appeal on August 3, 1967 (R. 208), within the time allowed by Rule 73(a), Federal Rules of Civil Procedure.

By reason of the foregoing, this court has jurisdiction to review the judgment of the District Court under the provisions of 28 USCA, Section 1291.

STATEMENT OF THE CASE

A. Nature of the Action

This is a declaratory judgment action brought by Rockwood Water District ("appellee") against General Insurance Company of America ("appellant"). It was brought to determine the relative rights, duties and liabilities of the parties under two comprehensive liability policies issued by appellant to appellee (R. 95).

B. Summary of Facts

Appellee is a water district located east of Portland, Oregon. It supplies its users with Bull Run water purchased from the city (R. 95).

The policies involved in this case are comprehensive liability policies issued by appellant to appellee covering the periods from June 1, 1962, to June 1, 1963 (Policy A)[2] and June 1, 1964, to June 1, 1965 (Policy B)[3] (R. 95). Pretrial Exhibits A (R. 110) and B (R. 135) are copies of Policy A and Policy B, respectively.

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[2] Examination of this policy indicates that it covered the policy year 1962-1963. No policy was issued for the policy year 1963-1964, but the original policy continued in effect.

[3] This policy was cancelled on December 14, 1964, and appellant refunded to appellee the portion of the premium which was unearned (R. 95).

The following provisions of Policy A are relevant to the question presented on this appeal (R. 111, 130, 131):

> "GENERAL INSURANCE COMPANY OF AMERICA * * * AGREES with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy: * * *
>
> "CONDITIONS
>
> "* * * 8. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, * * *
>
> "13. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights."

Policy B contains the following provisions relevant to this appeal (R. 136, 157):

> "GENERAL INSURANCE COMPANY OF AMERICA * * * AGREES with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and subject to the limits of liability, exclusions, conditions and other terms of this policy: * * *
>
> "CONDITIONS
>
> "* * * 7. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, * * *
>
> "9. Subrogation. In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

Before the first policy was issued, a problem arose with respect to tar particles in the water furnished by appellee, resulting from appellee's use of defective water pipe which it had purchased from Beall Pipe & Tank Co.("Beall"). Commencing in 1960, complaints were received by appellee concerning foreign substances in the water (R. 98, 100; Exs. 60, 84, 85, 86, 94).

March 1, 1963, appellee filed an action in the Circuit Court in Multnomah County, Oregon, against Beall to recover damages allegedly resulting from the purchase of the defective water pipe by appellee from Beall (Pretrial Ex. J, R. 173). Appellant was not notified that this action had been filed. Appellee sought to recover damages for the following items (R. 204):

"1) diminution in the value of the pipe;

"2) depreciation in value of the District's water system;

"3) expense in removal of loose asphalt material from the system; and

"4) expense of repairing and replacing parts of the system."

January 27, 1964, Electronic Specialty Co.("Electronic") complained to appellee that tar from the water was getting into its welding water cooling lines and that its boiler was corroded. At that time, Electronic requested a water analysis (R. 96).

. . . before the first policy was issued. A question arose

ith respect to the corrosion in [illegible] [illegible] by

mplaint, resulting from appellee's use of corrosive water

ipe which it had purchased from [illegible] Pipe ("[illegible]").

ommencing in 1960, complaints were received as appellant's con-

uming foreign substances in the water (R. 57; [illegible] Tr. [illegible],

, 80, 88, 90).

March 1, 1962, appellant filed an action in the

ircuit Court in Multnomah County, Oregon, against [illegible] to

ecover damages allegedly resulting from the presence of the

[illegible] water pipe it acquired from [illegible] (Pretrial No. 2,

4(3)). Appellant was not notified that this action had

een filed. Appellant sought to recover damages for the

ollowing items (R. 24):

"(1) Reductions in the value of the plant;

"(2) Depreciation in value of the District's water system;

"(3) expense in removal of loose asphalt material from the system; and

"(4) expense of repairing and replacing parts of the system."

January 27, 1964, [illegible] Company, Inc. ("[illegible]")

omplained to appellee that tar from the water was getting into

s cooling water cooling lines and that the [illegible] [illegible]

at that time, [illegible] requested a water analysis (R. 86).

May 19, 1964, Suzanne Spangler advised appellee that she was experiencing difficulties because of tar in the water (R. 97).

By letter dated July 9, 1964 (Pretrial Ex. C, R. 159), Electronic notified appellee that it intended to claim damages resulting from the tar in its water supply, a matter which had been brought to appellee's attention "some months past." Electronic further advised that the extent of its damages had not as yet been ascertained.

October 7, 1964, appellant learned <u>for the first time</u> of appellee's pending action against Beall. On that date, appellant's representatives Thomas E. Wernette, Thomas K. Klosterman, Jr., and Charles G. Carson attended a meeting at Electronic's plant (Ex. 91, page 7). At that meeting, appellant was advised that appellee had commenced a lawsuit against Beall, which was then on the eve of trial (Ex. 91, pages 9-11; Ex. 90, pages 16-17; Ex. 16; Ex. 18; Tr.[4] 115).

Appellee's action against Beall was tried commencing October 12, 1964 (Pretrial Ex. J, R. 192).

By letter dated October 23, 1964, appellant advised appellee that the latter's action against Beall was prejudicial to appellant's right of subrogation against Beall (Ex. 1 to Ex. 91):

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[4] The transcript of testimony is referred to herein as "Tr."

> "If at some later date we should settle such claims or pay any judgment, it would appear that our right to subrogation against Beall Pipe & Tank Corp. has been lost by your filing of the lawsuit to which reference has been made and to proceeding to trial of such lawsuit."

January 24, 1965, Mr. and Mrs. Spangler ("the Spanglers") submitted a written claim to appellee for damage to clothes and appliances and for inconvenience (R. 97).

March 2, 1965, judgment was entered in favor of appellee in its action against Beall in the sum of $200,000 (Pretrial Ex. J, R. 190).

July 12, 1965, appellant advised appellee that the claims asserted by Electronic and the Spanglers were not covered by its policies (R. 96, 97; Pretrial Ex. E, R. 162).

November 4, 1965, the Spanglers filed an action against appellee in the Circuit Court in Multnomah County, Oregon, to recover damages allegedly resulting from appellee's failure to supply the Spanglers' residence with water which was safe and adequate for their domestic use (R. 97). Pretrial Exhibit I is a copy of the second amended complaint in that action (R. 171). Appellant declined to proceed with the defense of the Spanglers' action when such defense was tendered to it (R. 97). The Spangler claim was ultimately settled by appellee for the sum of $400.

January 25, 1966, Electronic filed an action against appellee in the United States District Court for the District of Oregon to recover $65,400 in damages for alleged losses to

ts plant equipment and products resulting from impurities n the water supplied to it by appellee (R. 96). Pretrial xhibit F is a copy of the complaint in that action (R. 164). ppellant declined to proceed with the defense of this action hen the same was tendered to it (R. 97; Pretrial Ex. G, R. 69).

By this declaratory judgment proceeding, appellee ought to compel appellant to defend the Electronic and pangler claims and to pay all damages appellee might be equired to pay to Electronic and the Spanglers (R. 101-102).

C. Nature of the Judgment

By its judgment in this case (R. 206-207), the istrict Court held that appellant is obligated (1) to defend he action brought by Electronic against appellee, and to pay ll damages and costs appellee may become legally bound to ay therein, (2) to reimburse appellee for the amount it paid he Spanglers in settlement of their action against appellee, lus interest from the date of payment, and (3) to pay appellee its reasonable expenses and attorneys' fees incurred in the lectronic and Spangler actions and in this action.

D. Question Presented on Appeal.

A number of issues were presented to the District ourt in this case, all of which were ruled upon by the court. This appeal, however, relates to only one of the issues which

which were before the trial court for determination, that is, the effect of appellee's action against Beall upon the policy coverage.

At trial, appellant showed the court that appellee, having already obtained a judgment against Beall, could not effectively subrogate appellant for appellee in any future proceeding against Beall based upon the Electronic and Spangler claims because of the defense of res judicata. Nevertheless, the trial court, without citing any authority, held (R. 203-205) to the contrary.

Accordingly, the question presented for determination on appeal is whether the District Court erred when it concluded that appellant's right of subrogation has not been rendered valueless or destroyed by reason of the availability to Beall of the defense of res judicata. If the answer to this question is in the affirmative, then judgment must be entered for appellant.

SPECIFICATION OF ERROR

The District Court erred when it concluded (R. 203-205) that appellee's action against Beall and the judgment in such action did not destroy or render valueless appellant's right of subrogation in any action against Beall based on the Electronic and Spangler claims.

SUMMARY OF ARGUMENT

The judgment appellee obtained against Beall destroyed or rendered valueless appellant's right of subrogation in any future proceeding against Beall because of the defense of res judicata.

ARGUMENT

The District Court erred when it held that appellee's judgment against Beall did not prejudice or render valueless appellant's right of subrogation.

As indicated hereinabove (supra, page 4), appellant had rights of subrogation under both policies. Furthermore, these rights would have obtained even in the absence of express policy provisions.

American Central Ins. Co. v. Weller (1923)
106 Or 494, 502-503, 212 Pac 803, 805

> "It is unquestionably the general rule that on payment of a loss, the insurer acquires the right to be subrogated pro tanto to any right of action which the insured may have against any third person whose wrongful act or neglect caused the loss: 14 R. C. L., p. 1404, § 568, note."

In this case, appellee seeks to have a judgment entered requiring appellant to defend the claim asserted by Electronic, to satisfy any judgment against appellee, and to pay any amounts expended in settlement and related expenses. Under the policies and general legal principles, if appellee's position is correct, appellant ordinarily would have the right of subrogation to appellee's cause of action against Beall arising out of the Electronic and Spangler claims, and therefore to recover the amount of its loss from Beall. However, appellee's own conduct in obtaining a judgment against Beall under the circumstances previously set forth has destroyed

r rendered valueless the right of subrogation against Beall, hich appellant might otherwise have had.

Thus, an insurer's rights of subrogation are derived rom the insured's right to recover as against the wrongdoer. ccordingly, if the insured, for example, effectively releases he wrongdoer, as by obtaining a judgment against him for the oss, the insured destroys his own right, if any, to pursue he wrongdoer, and, with that right, both the insurer's rights f subrogation and the insured's right under the policies gainst the insurer.

9A Am Jur, Insurance, Section 1738, page 810

> "Since the right of an insurer to subrogation against the one responsible for the loss is derived from the right of the insured against such person, the right of the insurer against the wrongdoer may be defeated by any act of the insured, prior to the loss, or even after the loss, amounting to an effective release of the wrongdoer from liability. Thus, the insurer's right to subrogation may be defeated * * * where the insured recovers the amount of the loss from the wrongdoer; * * *"

Appleman on Insurance Law and Practice,
ection 4095, pages 596-597

> "It has been held that a recovery by the insured from a third person whose negligence caused the loss, extinguishes the liability of the insurer. The reason for this rule has been stated to be that such action by the insured renders it impossible for him to assign his rights to the insurer, in accordance with his subrogation agreement."

Packham v. German Fire Ins. Co. (1900) 91 Md 515, 526
46 Atl 1066, 1068

"It yet remains for us to determine whether the proceedings resulting in the judgment against the gas company released the wrongdoer and destroyed the defendant's right of subrogation. Now, there was in this case but one tortious or negligent act of the gas company resulting in one fire which occurred at one and the same time, as well the loss incurred under this policy as the loss incurred under the other policies for which recovery was had against the gas company. This is admitted by the demurrer, as well as the further facts that that suit was for the whole loss occasioned by the fire; that there was no reservation of any right by the plaintiff for the protection of this defendant, and no agreement qualifying the effect of the verdict, and that by the direction of the plaintiff the recovery did not include any compensation for loss incurred under this policy, and the defendant has no interest in the recovery as to the policy with which we are now concerned. For a single indivisible tort but one suit can be brought. The plaintiff in this case could not now bring another suit against the gas company for his own benefit to recover the loss incurred under this policy, nor could such suit be brought in his name for the benefit of the defendant. * * * The plaintiff had one indivisible cause of action against the gas company, and that cause of action has been merged in the judgment he obtained. When he excluded from that judgment so much of that cause of action as relates to this policy, he as effectually released so much of his right of action as if he had executed and delivered a release under seal therefor, and as clearly and unequivocally destroyed the defendant's right of subrogation as he would have destroyed it by such release. Any act which makes performance of the agreement to assign either impossible or useless must relieve the insurance company from its concurrent obligation to pay. The plaintiff in the present case, in order to protect his larger interests under the other policies, and his interest in recovery for loss of profits which were uninsured, has seen fit, for reasons doubtless satisfactory to him, to sacrifice his own and defendant's interest under the policy in question, and cannot now be heard to complain of the result of his own course of conduct."

[illegible]

It yet remains for us to determine whether the [illegible]

In the case at bar, appellee has recovered judgment against Beall for the full amount of its alleged losses, namely:

1. Diminution in the value of the pipe;

2. Depreciation in value of the District's water system;

3. Expense in removal of loose asphalt material from the system; and

4. Expense of repairing and replacing parts of the system.

Under the foregoing authorities, appellant's right of subrogation has been extinguished or rendered valueless and with it, appellee's rights, if any, under the policies.

The District Court concluded, however, that an action may be maintained against Beall based on the Electronic and Spangler claims, despite the judgment already entered against it (R. 204-205):

> "There was no claim by Rockwood for damages suffered by its customers, and this is the only type of damage for which General might have any right of subrogation.
>
> "The Electronic and Spangler causes of action had not arisen on March 1, 1963, the date the Beall action was filed; they had not matured at the time the action was tried in October of 1964. Electronic Specialty Company did not ascertain the amount of damage it had sustained until December 1, 1965, and Spanglers did not claim damages from Rockwood until January 24, 1965.

> "Rockwood has done nothing to prejudice whatever rights it might have against Beall Pipe & Tank Company to recoup damages which Electronic might recover against Rockwood in its action now pending or the $400.00 damages paid by the District to Spanglers in settlement of their action. Therefore, the action by Rockwood against Beall Pipe & Tank Company and the resulting judgment has not prejudiced any rights of subrogation of General Insurance."

This of course ignores the rule, referred to in the authorities cited hereinabove, that a single tortious act (such as the sale of defective pipe by Beall to appellee) can be the basis of only one cause of action in tort. This cause of action cannot be divided into several demands and be made the subject of several lawsuits.

White v. Pacific Tel. & Tel. Co. (1942)
168 Or 371, 377-378, 123 P2d 193, 196

> "It is also the general rule that a single, wrongful or negligent act can be the basis of but a single cause of action ex delicto, and that such a cause of action cannot be divided into distinct demands and be made the subject of separate suits."

The same rule applies in actions ex contractu.

Johnson v. Prineville (1921) 100 Or 119, 122
196 Pac 821, 822

> "It is plain that the contract involved is an entire contract. The work was not to be done by installments. On the contrary, there was but a single task to be performed for a single compensation. Normally, only a single cause of suit or action would arise out of a breach of such a contract, so that the principle applies that no one can be twice vexed for the same cause of suit or action. * * *"

Beall committed a single act, whether it be regarded ıs tortious or breach of contract, when it sold the defective ɔipe to appellee. Appellee has recovered from Beall damages 'or the following items (R. 204):

"1) diminution in the value of the pipe;

"2) depreciation in value of the District's water system;

"3) expense in removal of loose asphalt material from the system; and

"4) expense of repairing and replacing parts of the system."

It has no further cause of action against Beall and ıeither does appellant by way of subrogation. As a result, ıny rights appellee might have had against appellant under ;he policies in suit have been extinguished.

Furthermore, the foregoing rules as to splitting ;auses of action apply whether or not all the damages were ıscertainable at the time of the first action. See

Judd v. Comar Oil Co. (1935) 172 Okla 538,
45 P2d 532

This was an action to recover damages to a farm caused by drainage from an oil field. The trial court held that the action was barred by a former recovery in another action, and, on appeal, its judgment was affirmed.

The court stated (172 Okla 539, 45 P2d 533-534):

"It is the contention of plaintiff in this case in this court that the injuries complained of in this action were not included in the former case, and that at the time that case was tried they could not have been reasonably anticipated. It is important to note in this connection that it is not contended by plaintiff that the subsequent injuries to his farm were caused in whole or in part by wrongful pollution occurring subsequent to the first suit and recovery. In other words, the plaintiff is asserting that, even though the subsequent injuries were the result of the same wrongful pollution that previously permanently destroyed the 30-acre flood bottom portion of his farm, he is entitled to recover because he could not, at the time the former suit was tried, ascertain or anticipate subsequent damages to the portions of his farm not then injured, but which were subsequently injured as a result of the same tortious acts which caused the previous injury. * * *

"* * * The question of whether or not subsequent damages which were not ascertainable at the time of the previous action can be recovered in a second action, when both the previous and subsequent damages are the result of the same tortious act, is ably discussed in Freeman on Judgments, volume 2 of the Fifth Edition, at pages 1259 to 1263, inclusive. The learned author also recognizes in his discussion the underlying principles and reasons for adherence to the rule. We therefore deem it proper to quote at length. In discussing the subject he states:

"'Splitting Damages.---Where a cause of action consists in a right to damages, all the damages of whatsoever nature, both present and prospective, must be recovered in a single action; a recovery of part of them bars on (sic) another action for the remainder. The fact that the court erroneously restricts the party as to the damages which he may prove does not alter the rule, since he should have taken appropriate steps to correct the error. Neither does the fact that damages were not known or ascertainable or had not then been actually suffered, if the claim was single and indivisible, except in those courts which make an exception to the rule on the ground of unavoidable ignorance or mistake. * * *

"Up to the conclusion of [illegible] in this court from the [illegible] in this session were the instances in the former cases, and that at the same time [illegible] could not have been reasonably anticipated. It is immaterial [illegible] in this connection that it is now [illegible] by plaintiff that the subsequent injuries [illegible] were caused in whole or in part by [illegible] subsequent [illegible] of the first [illegible]. In other words, the plaintiff is [illegible] this, even though the [illegible] and [illegible], of the same [illegible] previously [illegible] the [illegible] of the case, be [illegible]. At the time the former suit was tried, [illegible] anticipate subsequent [illegible] of the [illegible] as a result of the [illegible] which caused the previous injury. * * *

"* * * The question of whether or not subsequent damages which were not anticipated at the time of the previous action can be recovered in a second action, when both the previous and subsequent damages are the result of the same [illegible] act, is [illegible] in [illegible] on Judgments, [illegible] of the Fifth Edition, at pages [illegible]. The learned author also recognizes [illegible] underlying principles and reviews the [illegible] at the [illegible]. He [illegible] length. In discussing the subject he states:

"'Splitting demands.—Where a cause of action consists of a [illegible] damages, all the damages for [illegible] past, present and prospective, must be recovered in a single action, or [illegible] of [illegible]. The fact that the court [illegible] the damages which may have [illegible] after the suit, which [illegible] the [illegible]. [illegible] that [illegible] were not known or anticipated, or [illegible] single and indivisible, except in those [illegible] which may be [illegible] of unavoidable ignorance or mistake. * * *

> "'Damages Not Ascertainable or Not Yet Suffered. ---In harmony with the general rule already stated, the fact that the damages sought to be recovered in the second action had not become apparent when the former judgment was obtained does not take the case out of the rule against splitting indivisible demands. * * * The rule yields to no hardship. Unforeseen and improbable injuries resulting from any act are, equally with existing and probable injuries, parts of an inseverable demand. * * * No case can arise involving claims for serious injuries to the person in which the assessment of damage, as the law now stands, can be otherwise than imperfect and unfair. In the majority of cases, defendants must pay for damages which never develop; while in the minority, the most serious injuries must be borne without compensation. * * *
>
> "After a careful consideration of the reasons both for and against an adherence to the general rule, we have decided that it would be extremely dangerous to recognize an exception thereto.
>
> "The policy of the law is that controversies should be settled and all questions that could have been litigated in a particular action are deemed to have been settled thereby. The mere fact that greater damage may result from an injury than was anticipated by the party at the time of trial does not authorize a second or subsequent recovery." (Emphasis added)

Appellant has located one case which is directly in point on the question of whether appellee, and consequently appellant, might now maintain an action against Beall based on the Electronic and Spangler claims. In that case the court concluded that the judgment in the first action was res judicata as to further claims, and, as a result, no further action could be maintained. See

[illegible]

[illegible]

[illegible] (Emphasis added)

[illegible]

Cohan v. Associated Fur Farms (1952) 261 Wis 584, 53 NW2d 788

In 1947 Associated sued Armour for recovery of damages for breach of implied warranty of fitness of pork livers sold by Armour to Associated. As a result of the diseased condition of the livers, some of Associated's mink died. Judgment was rendered in favor of Associated in January, 1949.

In April, 1949, Cohan advised Associated that he was claiming damages for loss of mink by reason of the feeding of the same pork livers sold to him by Associated. Thereafter he instituted the lawsuit against Associated to recover for such losses.

Associated filed a cross complaint in the second lawsuit against Armour for judgment over in case judgment was obtained by Cohan against Associated. Armour filed a motion for summary judgment against Associated based upon the contention that the judgment rendered in the first lawsuit by Associated against Armour was res judicata as to the cross complaint.

The court granted the motion for summary judgment of Armour and dismissed Associated's cross complaint against it stating (261 Wis 596, 53 NW2d 794-795):

> "The judgment obtained by Associated in the federal court is res adjudicata. It might, in that action, have recovered all its loss 'directly and naturally resulting, in the ordinary course of events, from the breach of warranty,' Sec. 121.69(6), Stats., including any loss sustained on account of the resale of the livers to plaintiff. * * *
>
> "The fact that it might have been difficult in the action in the federal court to establish the extent of its liability to Cohan does not prevent the application of the doctrine. The difficulty may be conceded. But it would not have been impossible. Notice to Cohan of its intention to sue Armour or the offer of his testimony, obtained by means of subpoena, if necessary, would have afforded Associated the means of establishing its probable loss and the extent of its liability to the plaintiff. It appears from the record that Associated had notice that Cohan had suffered loss on account of the feeding of the pork livers. It seems, however, that even if he had not had such notice the judgment entered in the federal court would preclude recovery upon the cross-complaint. * * *
>
> "It is apparent, therefore, that the matter of Cohan's claim against Associated and Armour's liability to the latter on that account could have been litigated and determined in the federal court action. * * *
>
> "The judgment bars the claim of Associated now asserted in its cross-complaint."

Applying the Cohan holding to our case, we find the following similarity:

Appellee (as did Associated) sued Beall (Armour) for (R. 204):

> "1) diminution in the value of the pipe;
>
> "2) depreciation in value of the District's water system;
>
> "3) expense in removal of loose asphalt material from the system; and
>
> "4) expense of repairing and replacing parts of the system."

While this action was pending and at least three months before the trial appellee (as did Associated) had notice that Electronic (Cohan) claimed to have suffered loss on account of impure water. At that point, several alternatives were available to Rockwood.

1. It could have filed an amended complaint containing a prayer for declaratory judgment as to the rights which it had against Beall as a result of the claims of Electronic, or

2. It could have delayed the trial of the Rockwood v. Beall case pending the outcome of the controversy between Electronic and Rockwood.

Rockwood did neither but instead proceeded to trial.

The case at bar is, if anything, even stronger than the *Cohan* case. Thus, in this case appellee had ample notice before trial of its action against Beall that Electronic and the Spanglers were claiming damages. These claims should have been asserted against Beall in that action, and the judgment against Beall is, of course, res judicata.

In conclusion, then, appellee's judgment against Beall is res judicata of any claim it might assert based on injuries to Electronic or the Spanglers. As a result, that

judgment has destroyed or rendered valueless appellant's right to be subrogated and any right appellee might have had to enforce the provisions of the policies before this court.

The District Court erred when it reached a contrary conclusion, and its judgment should be reversed.

CONCLUSION

For the reasons set forth hereinabove, the judgment of the District Court should be reversed and judgment should be entered for appellant.

Respectfully submitted,

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APPENDIX

EXHIBIT NO.	OFFERED	IDENTIFIED	RECEIVED
1	108		see footnote 5
2	108		see footnote 5
3	108		see footnote 5
4	108		see footnote 5
5	108		see footnote 5
6	108		see footnote 5
7	108		see footnote 5
8	108		see footnote 5
9	108		see footnote 5
10	108		see footnote 5
11	108		see footnote 5
12	108		see footnote 5
13	108		see footnote 5
14	108		see footnote 5
15	108		see footnote 5
16	108		see footnote 5
17	108		see footnote 5
18	108		see footnote 5
19	108		see footnote 6

xhibit No.	Offered	Identified	Received
20	108		see footnote 5
21	108		see footnote 5
22	108		see footnote 5
23	108		see footnote 5
24	108		see footnote 5
25	108		see footnote 5
26	108		see footnote 7
51	108		see footnote 5
52	108		see footnote 5
53	108		see footnote 6
54	108		see footnote 6
55	108		see footnote 5
56	108		see footnote 5
57	108		see footnote 5
58	108		see footnote 5
59	108		see footnote 5
60	43	42 - 43	43
61	108		see footnote 5
62	108		see footnote 5
63	108		see footnote 6
64	108		see footnote 5
65	108		see footnote 5

Exhibit No.	Offered	Identified	Received
66	108		see footnote 5
67	108		see footnote 5
68	108		see footnote 5
69	108		see footnote 5
70	108		see footnote 5
71	108		see footnote 5
72	108		see footnote 5
73	108		see footnote 5
74	108		see footnote 5
75	108		see footnote 5
76	108		see footnote 5
77	108		see footnote 5
78	108		see footnote 5
79	108		see footnote 5
80	108		see footnote 5
81	108		see footnote 5
82	37	36 - 37	37
83	39	38 - 39	39 - 40
84	108		see footnote 5
85	108		see footnote 5
86	108		see footnote 5
87	108		see footnote 5
88	108		see footnote 5

xhibit No.	Offered	Identified	Received
89	108		see footnote 5
90	108		see footnote 5
91	108		see footnote 5
92	108		see footnote 5
93	108		see footnote 5
94	35	34 - 35	see footnote 5

The transcript of testimony does not reflect the admission f these exhibits, but it is counsel's recollection that they ere received, and the clerk's exhibit list so indicates.

Defendant objected to the admission of these exhibits (Tr. 09), and the transcript of testimony does not reflect their dmission. However, the clerk's exhibit list indicates that hey were received in evidence.

[7] The clerk's exhibit list indicates that this exhibit was eceived in evidence.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDRIC A. YERKE, JR.
Of Attorneys for Appellant